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PUTTING UP AND PUTTING DOWN: TOLERANCE RECONSIDERED[©]

BY MARTHA MINOW^{*}

One of the paradoxes of liberal societies arises from the commitment to tolerance.¹ A society committed to respecting the viewpoints and customs of diverse people within a pluralistic society inevitably encounters this challenge: will you tolerate those who themselves do not agree to respect the viewpoints or customs of others? Paradoxically, the liberal commitment to tolerance requires, at some point, intolerance for those who would reject that very commitment.

Imagine this paradox, however, from the other direction; imagine the perspective of the member of a group who rejects the liberal commitment to respect the viewpoints or customs of others, and yet, lives in a liberal society. This person may see the very *toleration* for variety as a threat to the integrity and coherence of his or her community's way of life.² This perspective is, perhaps, made even more understandable when a further assumption of liberal societies is brought to view. Liberalism treats the proper unit

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¹ See H. Marcuse, B. Moore Jr. & R.P. Wolff, *A Critique of Pure Tolerance* (Boston: Beacon Press, 1965).

² See also J. Halberstam, "The Paradox of Tolerance" (1982-83) 14 *Philosophical Forum* 190 (tolerance cannot even arise as a question unless the two people or groups disagree with one another, and traditional orthodoxies require commitments that are deliberately intolerant, i.e., by rejecting the possibility that their tenets could be wrong).

for concern as the separate and distinct individual. It is the individual who bears rights to develop and express viewpoints that en deserve tolerance, and it is the individual who is obliged to tolerate others. A contrasting assumption, however, identifies the individual as importantly located within a group of shared traditions.³ Someone proceeding with this contrasting assumption could argue that true tolerance requires recognition and respect for this contrasting mode of group identity. A diverse society would include some subcommunities that do not embrace the attitudes of liberal society and instead make commitments contrary to tolerance. Tolerance would thus require respect even for a subcommunity that inculcates attitudes that are inconsistent with – indeed, intolerant of – the liberal commitments to individual rights and to obligations of tolerance. Unless the larger society respects such subcommunities, it threatens their very viability and existence.⁴ Paradoxically, perhaps, this subcommunity views liberal tolerance as intolerance. Indeed, to the subcommunity, tolerance that stops short of accommodation is in effect intolerance, and tolerance that imposes routes of access to the larger society for each individual inside the subcommunity represents an invasion of the subcommunity's values and ways of life.

Thus, it depends on your perspective. Tolerance without accommodation perpetuates assumptions that some – who put up with others – are actually superior to those others. From another perspective, the very injunction to put up with others may be experienced as putting down some ways of life.

The debate between these two perspectives on tolerance is complicated by its intersection with another debate concerning the allocation of political and legal authority among local, state, national, and international levels of government. A superficial guess might

³ W.C. McWilliams, "American Pluralism: The Old Order Passeth" in L. Kristol & P. Weavers eds, *The Americans: An Inquiry into Fundamental Concepts of Man* (Lexington, MA: Lexington Books, 1976) at 293, 297; (traditionalists see humans as naturally dependent, social and political, and requiring strong bonds to family, church, and community for the very development of personal identity; for them, virtue is more important than freedom).

⁴ In particular, demands that each individual remain open to multiple viewpoints and that the community preserve rights for each individual to choose where and how to live threaten grave intolerance toward the subcommunity, its identity, and its needs. See generally *Wisconsin v. Yoder* 406 U.S. 205 (1972).

suggest that allocation of primary political power to local authorities would preserve cultural diversity, and increasing grants or concessions of authority to centralized or co-ordinated authorities would risk interference with the cultural diversity. But a closer look at the actual experiences of cultural diversity around the world demonstrates many contrary patterns. Often, increased centralization affords new protection for minority subgroups that otherwise face intolerance by local authorities.

Centralized rather than decentralized authority may be more protective of subgroups for two reasons. First, local governmental units seldom correspond to homogeneous communities. Thus, even with the most decentralized form of official authority, potential conflicts among cultural groups and tensions between majorities and minorities arise and persist. Secondly, centralized authorities may be more likely to pursue norms of tolerance because of pressures to solicit respect and maintain legitimacy among a broader array of interest groups and communities.

It may often be the case that the content of the norms adopted by a government, at any level, will be more relevant to the question of tolerance for diverse cultures than will the actual level of government entrusted with final authority on the question. A local, state, national, or transnational authority could embrace a policy of respect for the practices adopted by a minority subcommunity. Similarly, any level of governmental authority could adopt a rule that is intolerant of cultural practices or deviations from the rules applicable to the majority.

In sum, like the paradox of tolerance itself, a related paradox arises in the choices from among competing models of relationships between and among local, regional, national, and international political units – and even non-governmental units, such as designated religious institutions. A commitment to respect diversity may seem to support respect for the more immediate levels of government through which policies tailored to particular communities may be developed. And yet, minority groups in any given community may find greater support for their different needs and interests in a strong political authority that announces protections for minorities and restricts the prerogatives of local authorities. A political commitment to diversity may require, at some point, regulation of the self-determination processes of local authority in order to protect

subgroups within their midst, even though the local authorities may themselves assert the goal of diversity in order to preserve their own autonomy.

Yet, there arises a third paradox or twist in the problem. Centralized authority structures may recognize and implement rights that are contrary to the preferences of local authorities, and thereby create avenues for individuals to challenge practices of subgroups. The results may pose a threat to the autonomy and vitality of distinctive cultures. Cultural subcommunities may thus clash with the prerogatives of local authorities, the preferences of centralized authorities, and the commitments of any governmental authority to respect rights of individuals to leave or reject aspects of a subcommunity. The creation of centralized authorities empowered to protect subgroups may itself threaten the viability of subgroups by elaborating rights for individuals to escape subgroups. Centralized authority may challenge cultural diversity in other ways as well, especially in pursuing goals that are insensitive to or disruptive of some forms of cultural practice and identity.

These issues are vital as various nations and continents struggle with relationships among subgroups in their midst. Will adoption of national and international conceptions of individual rights promote the ideals of tolerance, or impose one from among competing perspectives about individuality, group identity, and fundamental values? As Europe heads toward 1992, and promotes harmonization of economic and regulatory arrangements, the treatment of ethnic and religious subgroups will surface even if it is not intended as a subject for concern. As the United States and Canada struggle with new waves of immigrants, old issues about the treatment of subgroups will be posed in the context of evolving legal rights. Similar issues in India, Sri Lanka, the Soviet Union, and other parts of the world have inspired scholarly and political attention.⁵

Tensions between solutions that emphasize the rights of each distinct individual and solutions that recognize a realm of self-governance for subgroups become especially salient when

⁵ See generally D.L. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985).

women's rights as pronounced by central governments conflict with deference to distinctive cultural groupings which operate on contrary assumptions about women, families, and community. With the potential conflict between women's rights and respect for cultural differences as a recurring concern, I will examine the issues of tolerance through a discussion of definitions and assumptions, and through an exploration of a range of challenges to cultural diversity that arise across a range of contemporary societies. Approaching the issues from another direction, however, I identify the threats to such values as gender equality and individual freedom posed by unrelenting commitment to cultural integrity. I explore arguments for maintaining cultural diversity while articulating a conception of oppression to set the boundaries of tolerance. I also suggest the consequences of these arguments for models of governmental authority. I recommend, and hope here to exemplify, a recognition of the long-standing tensions and paradoxes of tolerance, centralization and decentralization, respect for individuals, and respect for groups that demands a continuing struggle to avoid simple answers about these subjects.

I. PRELUDE: STARTING POINTS

It is uncertain how much we agree and disagree on the issues addressed here. We certainly cannot begin to find out until we reach some tentative agreement about what we mean. Yet, it is a fair guess that the very terms we use embody ambiguities and disagreements rather than providing tools for sorting them out.

At the risk of seeming didactic – and the probably greater risk of proving inconsistent over the course of the paper – I offer some basic definitions for the central concepts in the paper. I do not claim to resolve persistent disputes over the meanings of contested terms, but offer working definitions, subject to modification in light of the discussion which follows:

(1) *culture* refers to a way of life shared by a group; the way of life may be constituted by various factors such as daily habits of meals and dress, shared and often unstated assumptions, a shared language, shared religious beliefs or practices, a common way of making life meaningful, a shared heritage or tradition, or a collective

intent to create one. There may be conflict and disputes within a culture. Membership is determined by the culture, through its own rules and customs regarding membership;⁶

(2) *subgroup* refers to a group living or working within a larger group and having members who identify themselves as a distinctive enclave or as otherwise collectively different from others in the larger group; a subgroup may itself represent a culture or members of one culture that have moved to another country or society where other culture(s) also exist or predominate;⁷

(3) *tolerance* is a political and psychological stance toward varieties of viewpoints, customs, and behaviours that signals passive acceptance and allows that variety to exist without interference or disapproval;⁸

(4) *respect for cultural diversity* is a more active demand than tolerance, for it may call for accommodation of subgroup practices and, therefore, changes in dominant institutions;⁹

(5) *federalism* refers to a structure of governmental relationships that permits integration among different levels of authority without absorbing local authorities into a centralized, superior, or higher authority; it represents simultaneously the diffusion of power and its concentration in order to achieve common or shared ends, including continued respect for the diffusion of power.¹⁰

⁶ See generally C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

⁷ There are many different dimensions of subgroup identity, and different subgroups differ in the particular constellation of such features as shared history, shared language, shared religion, shared geographic location, shared social status, and shared treatment by others.

⁸ See generally *The Oxford English Dictionary*.

⁹ For cogent statements of contrasting positions in the contemporary debate over accommodation in the context of the United States Constitutional law and religion, see M.W. McConnell, "Accommodation of Religion" (1985) Sup. Ct. Rev. 1; M. Tushnet, "The Emerging Principle of Accommodation of Religion (Dubitante)" (1988) 76 Georgetown L.J. 1691.

¹⁰ Generally, see D.J. Elazar, ed., *Federalism and Political Integration* (Ramat Gan, Israel: Turtledove, 1979).

Even with these definitions as starting points, we are not likely to understand how and where we agree and disagree without further statements of assumptions. Let me start by explaining my assumption that preserving distinctive cultural groups is a worthy social and political goal. I understand that this is not obvious. Some may argue a contrary view on the grounds that many of the groups that concern me are traditional and out-dated, especially since their origins in pre-industrial societies predispose them to frequent clashes with the economic and social practices of an industrialized and even post-industrialized world. Other critics may emphasize the constant risk of conflict posed by distinctive cultural and ethnic groups. From their perspective, integration and assimilation are worthy goals as well as important means to promote peace. Why, then, should we even seek to protect cultural minorities?

From the vantage point of a cultural minority, preserving cultural diversity is a matter of self-preservation. Diversity here becomes a code word for allowing minority groups to retain some autonomy. From the vantage point of majorities, why should cultural diversity be valued? For the majority, perhaps it should be enough that members of minority cultures advocate preserving cultural diversity, but this argument has never been enough, practically, nor even theoretically. Nor is this goal defensible solely in terms of a liberal commitment to tolerance, and indeed, there are considerable shortcomings in such a commitment as a means to advance the goal of preserving opportunities for potentially intolerant subcommunities to exist and grow.

I suggest three reasons why majorities that are not composed of traditional subcultures should be interested in preserving cultural diversity. The first reason matches the challenge presented not only by many defenders of traditional cultures, but also by many contemporary advocates of republicanism, feminism, and communitarianism:¹¹ they criticize political systems that prize only individual liberty without valuing primary group identities. They argue that diverse subcultures provide settings in which individuals

¹¹ See generally F. Michelman, "Law's Republic" (1988) 97 Yale L.J. 1493; S. Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication" (1986) 72 Va. L. Rev. 543.

can develop a sense of themselves through their membership in groups joined by common histories and common commitments. For many people who define themselves at least in part in terms of a group identity, that identity is both chosen and found; the group's "existence and relations one experiences as always already having been."¹² Such a sense of self, constituted in membership, that is both prior to the self and chosen or reaffirmed, provides a basis for psychological and social stability.

Secondly, multiple communities of meaning also provide some check against a kind of absolute authority structure that could suppress alternatives with grave risks of totalitarian power, as well as poor results.¹³ De Tocqueville was not the first or the last to note how intermediate organizations provide important buffers between the individual and the state, and diffuse the potential tyranny of a centralized government somewhat like a federal system of government itself, with its multiple levels and separation of powers.¹⁴

Thirdly, in a real sense, tolerance and equality depend upon the very preservation of differences that could become subject to tolerance and equal treatment. The continuing presence of the *other* is also critical for oppressing them, as Hegel so powerfully explored in his discussion of the master's need for the slave.¹⁵ There is no other to oppress if the master destroys the slave. But a more subtle need for the other arises in commitments to respect

¹² See I.M. Young, "Five Faces of Oppression" (1988) 19 *Philosophical Forum* 270 at 274.

¹³ Cf. P. Chevigny, *More Speech: Dialogue, Rights and Modern Liberty* (Philadelphia: Temple University Press, 1988) (arguing for justifications for free speech and due process on the basis of the philosophic, psychological, and political needs for dialogue).

¹⁴ Alexis de Tocqueville, *Democracy in America*, trans. H. Reeve, rev'd ed. (New York: Colonial Press, 1899); De Tocqueville also warned against the tyranny of the majority, and subsequent observers have commented on the intolerance enforced on those pressed to conform. See L. Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution*, 1st ed. (New York: Harcourt, Brace, 1955) at 55-56; see also D.J. Merritt, "The Guarantee Clause and State Autonomy: Federalism for a Third Century" (1988) 88 *Colum. L. Rev.* 1 (discussing values of federalism).

¹⁵ For a contemporary elaboration of his analysis, see J. Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (New York: Pantheon Books, 1988) at 31-42, 51-84.

differences as well, even in the course of articulating one's own values.¹⁶ Despite these reasons, cultural diversity faces increasing challenges, as the next section explores.

II. THEMES OF VARIATION: CHALLENGES TO CULTURAL DIVERSITY

[T]he more perceptive [critics of liberalism] ... recognized in its espousal of tolerance the principal threat to the traditional society of shared values and community integration.

Robert Paul Wolff¹⁷

We are both on to our oppression and tricked by it.

Kate Bartlett¹⁸

Intolerance by official governmental acts presents obvious threats to cultural diversity. When the Supreme Court of the United States directed the enforcement of state laws against polygamy, it manifested "implacable hostility" to the Mormon religion and community.¹⁹ Even more virulent forms of governmental hostility – or majority hostility to minorities, channelled through governmental acts – appeared in the United States' internment of Japanese-Americans during World War II,²⁰ and the United States' and Canada's disregard for the land claims of their native peoples. Slavery in United States history presents a tortured strain in the treatment of minorities not only because of the legacies of state-supported oppression, but also because of the legacies of racial

¹⁶ See *ibid.* at 183-224 (exploring ways to promote mutual recognition between men and women rather than patterns of domination); J. Resnik, "Dependent Sovereigns: Indian Tribes, States and the Federal Courts" (1989) 56 U. Chi. L. Rev. 671. In discussing respect for the sovereignty of Indian tribes by federal courts, Resnik notes that "[t]he degree of toleration of the 'other sovereigns' decisions enables the federal government to make plain what its own values are" in a dialectic interaction.

¹⁷ See Wolff, *supra*, note 1 at 34.

¹⁸ K.T. Bartlett, Book Reviews of *Feminism Unmodified: Discourses on Life and Law* by C.A. MacKinnon and *Real Rape* by S. Estrich (1988) 13 Signs 879 at 885.

¹⁹ S. Nanda & J. Norgren, *American Cultural Pluralism and Law* (New York: Praeger, 1988) (discussing *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890); *Romney v. United States*, 136 U.S. 1 (1890)).

²⁰ See *Korematsu v. United States*, 323 U.S. 214 (1944).

separatism advocated by whites who sought to preserve their prerogatives.

Less obvious threats to cultural diversity arise in some governmental programs that espouse tolerance, in others that ostensibly pursue aims unrelated to either promoting or harming cultural diversity, and in still others that pursue policies against discrimination or domination even where embedded within historic cultural practices.

A. Threats to Cultural Diversity From Limited Views of Tolerance and Equality

Governmental programs embracing a commitment to equality may appear to implement tolerance for persons with varied religious, ethnic, and linguistic backgrounds. The actual interpretation of equality used in designing school programs and employment conditions, however, may impose one set of cultural norms that fail to respect and may even undermine other cultural traditions. An employer may seek out employees with varied cultural practices in pursuit of equality and yet impose rules for the workplace governing dress, diet, hours, or language that constrain the practices or beliefs of members of a cultural minority. Sometimes, legal challenges to such rules may secure judicial protection for the minority, although usually without the result of changing the workplace rules.

For example, a series of decisions by the United States Supreme Court have required state unemployment commissions to make unemployment benefits available to members of religious minorities who lost their jobs because the workplace rules were incompatible with their religious practices or beliefs.²¹ These decisions could indirectly convince employers to change their practices in order to avoid increased levies to support unemployment benefits, but the decisions do not themselves directly alter the

²¹ *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd of Indiana Employment Sec.*, 101 S. Ct. 1425 (1981); *Hobbie v. Unemployment Appeals Com'n of Florida*, 107 S. Ct. 1046 (1987). Some Canadian cases indicated demand for accommodation. *Re CNR Co. and Can. Human Rights Com'n* [1983] 147 D.L.R. (3d) 312 (Fed. C.A.), *aff'd* on other grounds (1985), [1986] 23 D.L.R. (4th) 481 (S.C.C.); *Re Ontario Human Rights Com'n and Simpsons-Sears Ltd.* (1985), [1986] 23 D.L.R. (4th) 321 (S.C.C.).

employers' prerogatives to structure the workplace in ways that constrain the practices and beliefs of minority groups. When the government itself has been the employer – in perhaps the *sui generis* situation of the federal military – requests to accommodate minority groups have proved unavailing.²² Failures of accommodation are hardly neutral when the rules that themselves differentially burden members of minority groups are constructed without them in mind. A form of intolerance, along with disrespect for cultural diversity, may arise in the sheer adoption and enforcement of rules designed by and for members of a dominant group that in effect exclude or constrain members of minority groups.²³

The guise of tolerance may accompany school programs that actually implement disrespect for cultural differences. A school dress code may lead school officials to bar a student who wears headgear and long hair in violation of the regulations, but what should happen when the student's appearance reflects his membership in a subgroup such as the Sikhs?²⁴ Failure to accommodate such subgroup differences, from the vantage point of the minority student, would be a definite interference with group membership. It would also matter little to that person if the school officials, and governing legal authorities, announce that discrimination in such contexts is permissible if exercised on bases other than racial differences.²⁵

From the vantage point of some religious and culturally conservative subcommunities, many school programs advance a liberal social philosophy promoting tolerance for varied lifestyles and beliefs at the cost of undermining the traditional values preferred by those subcommunities. In the United States, this conflict between *secular humanism* and *fundamentalist* subcultures has crystallized around

²² *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986) (the free exercise clause does not exempt an Orthodox Jew, who sought permission to wear a yarmulke while on active duty as a military psychologist, from Air Force dress regulations).

²³ See generally M. Minow, "The Supreme Court: 1986 Term-Foreword: Justice Engendered" (1987) 101 Harv. L. Rev. 10.

²⁴ See *Mandla v. Dowell Lee*, [1983] All E.R. 1062 (H.L.); H. Benyon & N. Love, "Mandla and the Meaning of 'Racial Group'" 100 L.Q. Rev. 120 at 348; see also *Re Bhinder and CNR Co.*, *supra*, note 21.

²⁵ See D.G.T. Williams, "Aspects of Equal Protection in the United Kingdom" (1985) 59 Tul. L. Rev. 959 at 971.

the treatment of the topic of evolution in public school classrooms. In the 1920s, fundamentalists pushed for and obtained state legislation prohibiting the teaching of evolution in schools receiving tax revenues. The prosecution of a teacher named John Scopes under the Tennessee statute produced a dramatic lawsuit that later became the basis for books, plays, and movies.²⁶ When the Supreme Court of the United States heard a similar case some forty years later, it found a state statute forbidding the teaching of evolution to violate the First Amendment's ban against the establishment of religion.²⁷ The Court reasoned that the statute adopted a particular religious viewpoint and its enforcement would put state power behind that viewpoint, in violation of the constitutional requirement to separate church and state. Fundamentalists, however, believe that school instruction in evolution and silence about the biblical story of creation amount to unconstitutional interference with their own beliefs and practices.

During the 1970s and 1980s, members of these groups lobbied for the passage of laws directing any teacher who instructs students in the theory of evolution to also provide instruction in *creation science*, a curriculum developed by fundamentalists to challenge the theory of evolution from their perspective while studiously avoiding explicit discussion of the bible or a divine role in creation. Court challenges to these statutes in Arkansas and Louisiana have produced judicial decisions rejecting creation science as being religious in purpose, and therefore in violation of the establishment clause of the First Amendment.²⁸ This entire story may seem an oddity produced by the combination of the United States' constitutional commitment to separate church and state, and the use of state-supported schools, rather than religious schools, by

²⁶ See, e.g., I. Stone, *Clarence Darrow for the Defense* (Garden City, N.Y.: Garden City, 1943); *Inherit the Wind* (movie). The trial transcript was published under the name, *The World's Most Famous Court Trial: State of Tennessee v. John Thomas Scopes* (1971). The Tennessee Supreme Court in essence reached a compromise decision in rejecting the fine against Scopes due to a procedural error while upholding the constitutionality of the statute forbidding instruction in evolution. See Nanda & Norgren, *supra*, note 19 at 124.

²⁷ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

²⁸ *McLean v. Arkansas Bd. of Education*, 529 F. Supp. 1255 (1982); *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987).

some members of religious minorities.²⁹ Yet, it illuminates the conflict between ostensible tolerance, advanced by members of a secular, liberal community, and perceptions of intolerance by members of religious, conservative subcommunities. Secular humanism, from the vantage point of certain religious subcommunities, is not a solvent of tolerance for all points of view but a conflicting belief system that threatens the integrity and viability of their own culture.³⁰

Moreover, these debates highlight the contexts in which such conflicts may be most pronounced: schooling and family prerogatives about raising children. When it comes to issues surrounding the acculturation of the next generation, even traditional liberals express doubts about the ideal of tolerance. Perhaps they assign their doubts to the view that children are not the sorts of individuals entitled to toleration for their own judgments; children instead are presumed to lack the capacity and competence to form their own views and need the guidance of adults. The child cannot be the individual accorded respect because the lack of confidence in the child is the starting point for this problem. But which adults should be entrusted with the power to choose for a child? Deference to any adult to make decisions about an individual child already departs from the liberal commitment to tolerate unique individual

²⁹ Although the U.S. constitution has been interpreted to require states to give parents the option to select private religious schools for their children (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)), it would counter many principles to direct that families seeking to preserve their religious identities *must* use such schools, especially since the ban against any state support for religion would place the entire financial burden of such education on the parents.

³⁰ This challenge has been made even more explicit in recent lawsuits brought by fundamentalists who challenge the books and curricula used in public schools for implementing "secular humanism," which they charge is a religion. See *Smith v. Bd. of School Commissioners*, 655 F. Supp. 939 (D. Ala. 1987) (ruling that specified texts imposed religious ideas of secular humanism that offend the First Amendment rights of religious plaintiffs). This decision was reversed by the Court of Appeals that reasoned that even if secular humanism is a religion, the textbooks at issue did not promote it. *Smith v. Bd. of School Commissioners of Mobile County*, 827 F. 2d 684 (11th Cir. 1987). See also *Mozert v. Hawkins County Bd. of Education*, 827 F. 2d 1058 (6th Cir. 1987) (rejecting challenge to school texts as a burden on religious exercises); *Engel v. Vitale*, 370 U.S. 421 (1962) (state may not establish a religion of secularism that is hostile to traditional religions). For a defense of decisions to prefer liberal culture over the objections of fundamentalists, see A. Gutmann, *Undemocratic Education* (paper presented to Harvard Law and Governance Seminar, (22 March 1989) [unpublished].

differences. Parents provide the obvious group to be entrusted with power to make decisions about their child's schooling and upbringing. Yet, if the parents seem disinclined to prepare the child for participation in the tolerant, liberal society, traditional liberals may be reluctant to extend complete toleration for whatever the parents select for the child.

Some advocates of liberal tolerance go so far as to criticize fundamentalists for their intolerance toward science, toward modernity, and toward the variety of viewpoints respected by liberals. Of course, this problem looks quite different to fundamentalist parents. They view the positions of secular liberals as threatening to – and intolerant of – their ways of life. They would not claim to be neutral, but instead, they seek to announce and protect particular values.³¹ Governmental policies to promote the preparation of children for participation in the dominant society may, thus, appear to run counter to the beliefs and practices of minority groups who disapprove of qualities in the dominant society. Even decisions to require literacy in a language used by a majority in the country could be seen, by some minority groups, as a threat to their cultural integrity.³²

In light of these examples, it is valuable to reconsider the meaning of tolerance and intolerance. Intolerance surely means interference with a given viewpoint or practice; it also means a refusal to accept that viewpoint or practice as something that a person should be able to adopt and express. Does intolerance also mean disapproval, or disagreement with that viewpoint or practice? That cannot be the case, because then tolerance would require the suspension of all judgments and all disagreements. And yet, mere noninterference seems inadequate to convey the idea captured by tolerance, especially where noninterference occurs within a context

³¹ Thus, when fundamentalists argue for "balanced treatment" of theories of evolution and theories of creation, they do not appeal to some abstract neutrality but instead seek recognition for their reference points – and a shift in the reference points used and promoted in the schools. Given emerging revisions by scientists that assault traditional views of evolution, see S.J. Gould, *Wonderful Life: The Burgess Shale and the Nature of History* (New York: W.W. Norton, 1989).

³² See R.F. Moran, "The Politics of Discretion: Federal Intervention in Bilingual Education" (1988) 76 Cal. L. Rev. 1249.

in which the viewpoint or practice does not conform to the majority practices. The majority may stigmatize, deride, or chill the adoption of minority group viewpoints or practices. The majority may undermine the conditions subgroups need to preserve in order to flourish. Apparently equal policies that nonetheless fail to accommodate the differences of a minority culture edge toward intolerance if those policies make expression or maintenance of the minority culture's views or practices difficult or costly to members of that group. Thus, some governmental policies that aspire to equality and neutrality, nonetheless, may be experienced by members of majority groups in ways that minority groups find threatening and intolerant of their culture.

Even where centralized authorities set out to protect a notion of group rights, like the rights of families to preserve their mutual relationships, the very conception of the group adopted by those authorities may depart from the group's own self-conception and impose considerable burdens as a result. For example, the European Commission and European Court have largely construed family to mean nuclear units of parents and children. This approach neglects or undervalues the notion of the extended family of grandparents, parents, and grandchildren, or aunts, uncles, and cousins. The state's contrary definition of family may conflict with these families' desires to enter or remain in a country where family members reside, to obtain custody of children, or to define family in ways that depart from the majority's practices.³³

B. Threats to Cultural Diversity Due to Centralized Governmental Policies

Some governmental policies designed to secure goals quite remote from the treatment of culturally diverse communities may nonetheless seem threatening to minority groups. For example, a

³³ G. Douglas, "The Family and the State Under the European Convention on Human Rights" (1988) 2 Int'l J. L. Fam. 76. See also *Moore v. East Cleveland*, 431 U.S. 494 (1977) (plurality opinion rejecting the city zoning ordinance defining family to exclude a grandmother living with two grandchildren who were offsprings of different sets of parents); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding zoning restriction that defined family to exclude a group of unrelated adults).

governmental plan to develop natural resources may run counter to the cultural or religious practices of a minority group.³⁴ Cultural subgroups may be disturbed by policies designed to promote general economic development by encouraging geographic and social mobility for workers and the skills necessary to promote such mobility. The European Community has embraced such policies to promote both the greatest possible freedom of movement for the factors of production and the greatest opportunities for success for individuals.³⁵ Accompanying such policies are commitments to guarantee individuals the right to pursue an occupation and to protect those individuals against any infringements by member states. The Community, therefore, bans discrimination on the basis of nationality for the purposes of employment, pay, and working conditions,³⁶ and declares the right of individuals to move freely across the territories of member states and to reside in any of the member states to pursue employment. Further, the Community establishes rights for the spouses of such workers to set up homes in any of the member states, and rights for the children to be admitted to "general educational, apprenticeship, and vocational courses under the same conditions as the children of national workers."³⁷ The Community also establishes, in considerable technical detail, methods for aggregating time worked and benefits earned under social security systems in member countries.³⁸

Promotion of free mobility of workers may appear to respect diversity, and yet this set of policies represents two sets of potential threats to cultural diversity. The first kind of threat is the sort, already discussed above, that can arise when the interpretation of

³⁴ See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988).

³⁵ See Commission of the European Communities, *Thirty Years of Community Law* (Luxembourg: Office for Official Publications of the European Communities, 1981) at 285-86 (discussing articles 48-51, EEC Treaty, Foundations of the Community (free movement of persons)).

³⁶ See art. 48 (2), EEC Treaty.

³⁷ See *Thirty Years of Community Law*, *supra*, note 35 at 290 (discussing article 12).

³⁸ Art. 51, EEC Treaty. See *Keller v. Caisse regionale d'assurance vieillesse des travailleurs salaries de Strasbourg*, [1971] E.C.R. (II) 885; *Laumann v. Landesversicherungsanstalt Rheinprovinz*, [1978] E.C.R. 805.

equality excludes accommodation for differences between people or groups. If the commitment to treat workers who have travelled from Italy the same as local German workers involves no accommodation for the linguistic, religious, or ethnic differences of the Italians, equality will provide a sham guarantee of mobility rights. Requiring the workers to be proficient in German, for example, could be characterized as treating all workers the same, but its differential impact on Italian and German workers will undercut the vision of equal opportunity. And even if a given Italian worker is proficient in German, prohibiting the use of Italian on the job would also represent a burden on that individual and on the cultural integrity of his group.

This very refusal to accommodate group differences has been approved in the United States. A federal court of appeals ruled that an employer had the power to establish English as the language that must be used on the job, despite a worker's claim that Spanish was not only his native language, but also the language used by seven out of eight of his co-workers and by 75 percent of his customers.³⁹ The employer allowed the workers to use Spanish when speaking with Spanish-speaking customers, but not when speaking with Spanish-speaking co-workers. The worker, Hector Garcia, had been discharged for violating the English-only rule after a Mexican-American co-worker asked about the availability of an item requested by a customer and Garcia replied in Spanish. At trial, Garcia introduced testimony that the Spanish language is the most important aspect of ethnic identification for Mexican-Americans. Despite a federal law forbidding employment discrimination on the basis of national origin, the court concluded that there is no right to speak any particular language while at work and that there was no evidence to establish that an atmosphere of racial or ethnic oppression prevailed at that workplace.

This decision might be construed as part of a larger pattern of rules designed to promote national unity even if that means subordinating linguistic diversity. If similar kinds of decisions are reached in Europe, problems may arise both in the unequal burdens on individuals who are linguistic minorities in the nation where they

³⁹ *Garcia v. Gloor*, 618 F. 2d 264 (1980).

work, and the dangers to the cultural integrity of linguistic minority groups.⁴⁰ Failures to accommodate differences can implement a kind of intolerance even if accomplished under overarching goals such as national unity, or mobility of labour. Similar failures of accommodation for the spouses and children of workers from other countries could carry large threats to the viability of their distinct cultural identities.

A second danger arises from the sheer inducement to dislocate individuals and nuclear families from larger family and community networks. The encouragement of labour mobility will itself disrupt patterns of family and community ties that cannot be reconstituted once disassembled. The devastation of cultures by natural disasters and by wars gives us much evidence of the dependence of cultural identity on geographic and intergenerational stability. A lawsuit brought by members of a community devastated by a natural disaster successfully convinced an American court that the loss of community ties itself supported enormous damages, despite the extremely modest monetary value of the property destroyed.⁴¹

During the past century, the United States witnessed economic policies that induced dislocations of families and individuals. Some corporations actually direct their employees to relocate in order to achieve promotions. Periods of economic difficulties such as the Depression of 1929 and the contemporary period of factory closings forced many relocations of families and individuals. Upwardly mobile Americans typically move to new areas. Often, as a result of higher education, family and cultural groups become dispersed. How much, if at all, do these patterns reflect deliberate policies?

Some have argued that the framers of the American Constitution contemplated a reduction of local and regional loyalties, even as they expected individuals to continue partial, lesser

⁴⁰ Canada's current struggle over the treatment of linguistic differences provides an important set of contrasts. See M. Minow, "Pluralisms" Conn. L. Rev. (forthcoming).

⁴¹ See K.T. Erikson, *Everything in Its Path: Destruction of Community in the Buffalo Creek Flood* (New York: Simon & Schuster, 1976); G.M. Stern, *The Buffalo Creek Disaster: The Story of the Survivors' Unprecedented Lawsuit* (New York: Random House, 1976).

affiliations based on family and local community ties.⁴² The framers no doubt imagined that people would remain closely attached to religious and regional identities, and would secure a sense of personal and communal stability on that basis. But, suspicious of groups with values distinct from the values of the whole nation, and distrustful of strong political affections in general, the framers sought to fragment loyalties by creating multiple sources of authority that could each properly lay claim to the attention of individuals.⁴³ The framers probably never imagined the continued challenges to the balance they sought between personal attachments to subcommunities and individual citizenship in the national community.

Largely a nation of immigrants who displaced the native communities, the United States has undergone repeated migrations with some ethnic and cultural subcommunities developing niches in particular cities. Indeed, the initial immigrations of families from countries outside the United States produced gatherings within metropolitan and rural areas of people from the same home country or even home town. Major American cities, thus, developed enclaves known as Chinatown, Little Italy, or other names based on the national or ethnic origins of the group. For those who maintained their subgroup identities, a route toward a sense of national identity could be found precisely in joining so many other Americans who could claim some subgroup identity that distinguished them from some unidentified majority.⁴⁴ Yet, after a first generation spent in urban enclaves, the second generations within many ethnic and religious groups tended to assimilate in the larger culture, and move away from the cultural enclave.⁴⁵ Deliberate programs of "Americanization" designed by those already settled in the United States pushed newer immigrants to assimilate, to join the "melting

⁴² See McWilliams, *supra*, note 3 at 296.

⁴³ *Ibid.*

⁴⁴ For an ingenious argument along these lines, combined with useful historical information, see R.L. Moore, *Religious Outsiders and the Making of Americans* (New York: Oxford University Press, 1986) and its discussion, *infra*, Part IV.

⁴⁵ The experiences of black people and Native Americans, in America in this respect, as in many other respects, require a different narrative that would emphasize the persistent patterns of segregation and exclusion erected and maintained by succeeding generations of white immigrants.

pot," in which individual and group differences merged into a stew softening or even dissolving those differences.⁴⁶ The emerging public culture emphasized both individualism – rather than religious, ethnic, or other group affiliations – and conformity to practices and values cutting across all groups with the help of mass commercial markets.⁴⁷ Economic centralization reduced individual attachments to local neighbourhoods and communities. People pursued job opportunities even if that meant moving across the state, or across the country.

By the second half of the twentieth century, large numbers of the 50 percent of the population who attend college or university programs leave their families and communities and do not return because of the economic opportunities available in other locations. The explicit creation of retirement communities for elderly people in locations removed from their families and homes further scatters families. Children and grandchildren who shed the ethnic and religious identities of their families is a familiar, white American story.⁴⁸ The story includes a sense of yearning for what was lost, and a search for some replacement community or group affiliation, sometimes leading to fierce but short-term attachments to charismatic figures or popular trends, or an effort to revive what the last generation gave up. In addition, critics locate sources of anomie and alienation in the creation of "shopping mall cultures" and the replacement of local customs by a homogenized, television culture.⁴⁹ Even ethnic identities may in part be taught by the mass media to people who lack more personal experiences with their different heritages.

European patterns, until recently, have been quite different. True, parts of European history surely demonstrate the extreme cruelties of discrimination and oppression motivated by animosities by some ethnic groups towards others. But the significance of place

⁴⁶ See R.H. Wiebe, *The Search for Order* (New York: Hill & Wang, 1967).

⁴⁷ See McWilliams, *supra*, note 3 at 303.

⁴⁸ See generally R.H. Bellah *et al.*, *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 1985).

⁴⁹ The original classic work on this subject is E. Durkheim, *Suicide: A Study in Sociology*, trans. G. Simpson & J.A. Spaulding (Glencoe, Ill.: Free Press, 1951).

or locale to most Europeans is persistent. The importance of one's identity as a Sicilian, or as someone from Turin, stems from a sense of family, history, and continuity that has not changed much for most Europeans even in the face of growing economic centralization. It may be worth considering, nonetheless, how the policies promoting free mobility of workers could push toward some resemblance with the experiences in the United States. Economic practices and policies have recruited workers from various countries to leave their homes and work elsewhere in Europe. One observer comments that

"[t]he result was to create polyethnic hierarchies on European soil, analogous to similar hierarchies which had existed in European colonial empires before the wars, and in lands of European overseas settlement from the moment of initial immigration. Thus we can say that Europe's proudest nations were catching up with the rest of the world, willy-nilly - or sinking to its level, if one values ethnic unity and cultural cohesiveness more highly than wealth and power."⁵⁰

In this way, governmental programs that ostensibly pursue aims unrelated to either promoting or harming cultural diversity, such as policies in favour of economic development and coordination, may disturb patterns of cultural diversity.⁵¹

C. Threats to Cultural Subgroups Posed by Individual Rights

A final set of challenges to cultural diversity arises from some governmental policies that directly assault practices internal to distinctive cultures by forbidding discrimination or domination on the basis of gender, race, religion, or disability even where such practices are embedded within cultural traditions.⁵² Here, centralized

⁵⁰ W.H. McNeill, *Polyethnicity and National Unity in World History* (Toronto: Univeristy of Toronto Press, 1986) at 69-70.

⁵¹ What kinds of policies could be devised to respect cultural differences or at least allow subgroups to retain some control over their own identities? For example, policies could promote geographic movement of cultural subcommunities as an ensemble rather than as individuals. Especially since return to home nations is not always practicable or likely, the challenge for the host country is to devise modes for including newcomers without forcing assimilation.

⁵² These antidiscrimination norms appear in the United States Constitution and statutes (such as Title VII), in the Canadian *Charter*, and to some extent, in current EEC law. See Council Directive of the European Communities of 9 February 1976 (76/207/EEC) and

governmental policies directly implement the liberal vision of the individual as the proper unit of analysis and proper locus for rights and tolerance, despite contrary cultural traditions that treat the family or the social group as the proper unit of analysis and locus for tolerance. One conflict over a liberal norm against gender discrimination arises where the governmental authority offers jobs to women as school bus drivers, but members of a religious community refuse to ride the bus on the grounds that their community would not allow women to hold such jobs. Another arose where a religiously-sponsored university faced the loss of its tax-exempt status under federal law because it refused on religious grounds to permit interracial dating among its students.⁵³ Yet another conflict occurred where a health club, owned by a religious organization, dismissed an employee who had lapsed from religious observance. The statute forbidding employment discrimination on the basis of religious identity would have prevented any other kind of employer from using religious observance in a dismissal decision, but the Supreme Court of the United States found an exemption for religious organizations from this ban against discrimination compatible with the Constitution.⁵⁴

In each of these cases, a direct tension arises between respect for the practices and preferences of a subgroup (organized around cultural identity or voluntary affiliation) and commitment to the liberal value of nondiscrimination on the basis of gender, race,

generally Council of Europe Committee of Ministers, *Legal Protection Against Sex Discrimination* (1985). See also European Convention of Human Rights (on gender discrimination).

⁵³ *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983) (rejecting the university's claim to tax-exempt and tax-deductible status).

⁵⁴ *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S. Ct. 2862 (1987). Recently, in the United States, a similar set of tensions has appeared in challenges to the discriminatory practices of private clubs against racial minorities and women under local or state laws protecting human rights; see as examples, *Board of Dirs. of Rotary Intern. v. Rotary Club*, 107 S. Ct. 1940 (1987); *Roberts v. United States Jaycees*, 104 U.S. 3244 (1984). See generally D.L. Rhode, "Association and Assimilation" (1986) 81 NW. U. L. Rev. 106. Different, but related, challenges have been posed to all-female and all-black clubs and colleges. See C.R. Feldblum, N.F. Krent & V.G. Watkins, "Legal Challenges to All-Female Organizations" (1986) 21 Harv. C.R.-C.L. L. Rev. 171.

religion, or other immutable traits.⁵⁵ Here, a threat to cultural integrity may accompany enforcement of antidiscrimination principles – yet arguments for enforcing those principles may be weighty and even sponsored by many who otherwise favour sensitivity to cultural differences.⁵⁶ Enforcement of antidiscrimination principles should not be endorsed, however, without at least noting and weighing the cost to the pre-existing cultural communities whose self-determination and integrity may be damaged or undermined.⁵⁷ Especially where intergenerational issues appear – as in the education and care of children – there may arise direct collisions between the priorities of a subcommunity and a liberal concern for individuals, apart from their subgroup identities.

In sum, threats to the preservation of distinctive cultures may arise in insensitive applications of equality norms that burden members of minority groups by treating them as though they were the same as members of majorities. A different source of threat occurs as centralized authorities pursue goals, such as national unity or international harmonization, that devalue cultural differences or prompt geographic dislocation. A final threat accompanies enforcement of antidiscrimination norms that challenge the contrary rules developed within some cultural traditions. In each instance, the conflicts arise in part when governments treat individuals as individuals, rather than as members of extended families and cultural and religious groups. And in each instance, what may seem justified on a theory of liberal tolerance may, to a minority group, seem to be severe disrespect for cultural diversity.

III. INTERRUPTION AND DISRUPTION FROM ANOTHER PERSPECTIVE: WHO MIGHT BE OPPRESSED BY

⁵⁵ Similar issues arise when a company owned by citizens of a foreign nation refuses to hire women or insists on hiring only employees from the home country, and then does business in a country that bans such discrimination.

⁵⁶ See N. Duclos, "Canada: Cultural Diversity Through Feminist Lens" *Buff. L. Rev.* (forthcoming).

⁵⁷ See R.M. Cover, "The Supreme Court, 1982 Term-Foreword: *Nomos* and Narrative" (1983) 97 *Harv. L. Rev.* 4 (exploring the damage to private normative communities caused by governmental control).

PRESERVING DISTINCTIVE CULTURES?

You will also have to come to terms with the sense of alienation, of not belonging, of having your world thoroughly disrupted, having it criticized and scrutinized from the point of view of those who have been harmed by it, having important concepts central to it dismissed, being viewed with mistrust, being seen as of no consequence except as an object of mistrust.

Maria C. Lugones and Elizabeth V. Spelman⁵⁸

As the author, I hope you have been nodding with agreement or willing suspension of disagreement up until now. But if you have, I also worry. I have tried up to this point to imagine how liberal norms of tolerance may seem disrespectful and even threatening to minority subgroups. But this risks taking that subgroup's perceptions not just as a starting point, but as the endpoint for analysis. It also risks implying that members of the subgroups are in agreement, and together, view all threats to cultural integrity in the same way. The last set of threats – threats posed by central governmental commitments against discrimination on the basis of race, gender, religion, and other characteristics – may well seem as harmful to some members of cultural subgroups as do any other external challenges. But because I suggest that threats to cultural integrity due to antidiscrimination policies stand on a different footing, I think we need to change course in the analysis here. Tolerance, as defined earlier, is a political and psychological stance towards varieties of viewpoints, customs, and behaviours, that signals acceptance and that allows such variety to exist without interference or disapproval. If the burden of the last section of the article was to show that tolerance, so defined, often requires more than mere noninterference, the burden of this section is to suggest that tolerance is not an unqualified good, and should be limited in the case of viewpoints, customs, and behaviours that systematically oppress members of the group.

In general, it is often useful to contrast a subcommunity's desire to export to the rest of the society those of its values that

⁵⁸ M.C. Lugones & E.V. Spelman, "Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for the 'Woman's Voice'" (1983) 6 *Women's Studies International Forum* 573 at 580. Although this essay was written for white feminists as a call to try understanding their exclusion from feminist theorizing, it suggests a method that could be used by other theorists who leave out certain people and their perspectives.

contradict the broader society's own commitments, with its desire to secure space free from intrusion to develop and perform its own practices.⁵⁹ The subgroup is often better able to persuade the majority to allow it separate space than to convince it to accept and implement its rules – such as rules about marriage, childrearing, alcohol consumption, or diet. Therefore, accommodations that exempt the subgroup from societal rules or that devolve authority to the subgroup for self-governance over particular matters are familiar and well-designed measures to implement tolerance while leaving the dominant culture unchanged.⁶⁰ The subgroup may thus secure greater deference in the name of autonomous self-governance than it would if it sought to influence or control the larger society.

This distinction does not work well when the group seeks to exercise its autonomy in ways that can be seen to discriminate against or oppress members of its own group who would be protected by antidiscrimination principles embraced by the larger society.⁶¹ When a religious subgroup implements practices that systematically subordinate some of its members, such as women and children, deference to the self-government and autonomy of the group, from the vantage point of a liberal society, is not well-placed. Indeed, this situation elicits several questions: Should the centralized government's guarantees of individual rights against discrimination be available to challenge those practices? Should the secular courts, for example, hear a dispute brought by a women member of a religious community who claims that her employment contract with a church school violates the law against sex discrimination by requiring her to resign if she becomes pregnant? And should the state's courts be available to hear a challenge by a female member of an Indian tribe

⁵⁹ Carol Weisbrod has identified two types of legal rules sought by minority groups in search of protection for their religious interests. The first is a search for space to practice their own culture; the second is the effort to inject their preferred practice as the rule to govern everyone. See C. Weisbrod, "Family, Church and State: An Essay on Constitutionalism and Religious Authority" (1987-88) 26 J. Fam. L. 741.

⁶⁰ See *Wisconsin v. Yoder*, *supra*, note 4.

⁶¹ *A fortiori*, the subgroup has even less likelihood of persuading the general society that it should be permitted to adopt practices that involve devaluation of some other members of the larger society, through caste systems or intolerance toward outsiders. See *Bob Jones University*, *supra*, note 53.

who objects to the tribal rules about property, inheritance, and the status of children because they deny to women members rights accorded to male members?⁶²

The problem is not unusual. Collisions between norms against gender discrimination and commitments to cultural diversity arise over marriage and divorce rules that disadvantage women in many subgroups.⁶³ Some subgroup views about abortion collide with women's rights of reproductive choice.⁶⁴ Some groups perform cliterectomies on their infant girls despite state laws deeming such practices child abuse. Others promote as a religious rite the self-sacrifice of a widow when her husband is buried, again despite governmental laws prohibiting such practices. These cultural traditions justifying physical abuse of women and children clash with emerging public policies punishing such conduct.

There are several options for the secular, public authority. It can permit, with varying degrees of affirmative assistance, access to its courts and agencies, and enforce general public policies and apply its anti-discrimination rules. If this is the option selected, the state officials should address whether pursuing this route, in effect, requires the complainant to leave her community and face its rejection because of her disloyalty.⁶⁵ If so, this option becomes largely subsumed by a second option: the state could work to assure

⁶² See Resnik, *supra*, note 16 (discussing *Santa Clara Pueblo v. Martinez*); *Santa Clara Pueblo* was a 1978 U.S. Supreme Court decision refusing jurisdiction sought by a woman member of a tribe who married a man out of the tribe. Her children, therefore, were deemed nonmembers by the tribe. She claimed that the federal statute, the *Indian Civil Rights Act*, imposes limits on tribes similar to those imposed on the states by the Bill of Rights and the 14th Amendment. The Supreme Court agreed, but also concluded that federal imposition of remedies would undermine tribal autonomy. The Court declined to find any implied cause of action that would allow the individual complainant to obtain federal court review of the discrimination charge.

⁶³ See T. Rostain, "Permissible Accommodations of Religion: Reconsidering the New York *Get* Statute," (1987) 96 Yale L.J. 1147 (defending secular accommodation for observant Jewish women who require a religious bill of divorcement from their husbands to be lawfully divorced under Jewish rules but whose husbands may withhold such a document under the typical secular law).

⁶⁴ See, e.g., Brief for Amicus Curaie for American Jewish Congress and thirty-five other religious groups in *Reproductive Services v. Webster*, 662 F. Supp. 407 (1987).

⁶⁵ See A.O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, Mass.: Harvard University Press, 1970) at 96.

the possibility of exit for any member of a subcommunity who seeks it. This would be no minor matter, especially since communicating the possibilities for exit could inject the state into the educational system of the subgroup, and because simply providing this exit option already changes the meaning of the group and of group membership if the group has used metaphors of family, natural origins, or divine command to explain itself.⁶⁶ At the same time, the exit option may seem so drastic that it provides little aid to any member who views it as too great a sacrifice to be traded against an individual right.

As a third option, the state could require the subgroup to establish procedures internal to the group permitting individuals to bring claims of unfair treatment. The state could even impose certain substantive norms, such as a ban against gender discrimination, while leaving it to the subgroup's own governance mechanisms to implement those norms. This approach can be attacked as both too intrusive and not intrusive enough. By dictating requirements of participatory processes, individual hearings, and norms of equality, the centralized authorities would be invading and possibly changing the core elements of a subgroup's autonomy. At the same time, by leaving interpretation and enforcement to those already in charge, the centralized authorities may be consigning the individual complainant not only to inevitable failure, but also to the status of a resented renegade purveying the outside threat to the subgroup's integrity. This option is worth considering, however, at least as an effort to acknowledge that preserving distinctive cultures does not mean preserving them in amber, but instead allowing them to grow and change in light of the struggles of their members and the pressures from outside challenges.

Each of these options explore what Hirschman has identified as "exit" and "voice."⁶⁷ They appear against a backdrop of presumed loyalty of subgroup members to their group, and yet the very

⁶⁶ Does this mandate universal exposure to educational materials prescribed by centralized authorities? Are there less intrusive ways to provide an exit option for individuals? Or could the commitment to protecting individuals within the subgroup involve the centralized government in prompting the subgroup itself to devise ways to change, ways devised by its own members? These are the kinds of questions unleashed by attention to the conflict between cultural integrity and individual rights.

⁶⁷ See Hirschman, *supra*, note 65 at 3-5.

discussion of options like exit or voice makes loyalty merely another option, rather than the necessary state of affairs, and elevates the individual and her choices as the important unit of analysis. This may be precisely what the subgroup's practices are designed to avoid. Thus, if we remain in the framework of tolerance, and ricochet between the perspectives of the dominant societal groups and the subgroups, there seems to be no answer, and no winning solution.

That cannot be right. What is missing is an acknowledgment that it is impossible to be neutral in the struggle between points of view and a normative commitment. What is missing is a substantive theory, a theory of oppression. This notion of oppression raises the issue of power implicit in the competition between points of view about tolerance. The very idea of tolerance as putting up with those one does not like depends, implicitly, on the view that those who put up have the power not to, have the power to reject, or stigmatize, or oppress the others. The notion of oppression also serves as a meeting ground between a commitment to preserve distinctive cultures and a commitment to implement laws against gender discrimination. Both commitments are efforts to resist what otherwise would be the likely course of events by dint of the distribution of power: the subgroups would risk domination by the majority, and women – given their historical treatment by multitudes of cultural and religious groups – would risk degradation or misuse by men.⁶⁸

In a recent article, Iris Marion Young offers an elaboration of oppression as a concept to be applied to actual social situations.⁶⁹ "[O]ppression is the inhibition of a group through a vast network of everyday practices, attitudes, assumptions, behaviours, and institutional rules."⁷⁰ She suggests five possible dimensions of

⁶⁸ Interestingly, it is possible that some subgroups historically provided greater equality between men and women than does dominant Western society - and contact with this dominant society exacerbates gender inequality. See S. Deutsch, "Women and Intercultural Relations: The Case of Hispanic New Mexico and Colorado" (1987) 12 *Signs: Journal of Women in Culture in Society* 719 at 737 (Hispanic men and women settling in the Anglo north suffered from narrowed opportunities, and women's opportunities suffered a decline compared to men's; women also became more marginal within the Anglo settings).

⁶⁹ See Young, *supra*, note 12.

⁷⁰ *Ibid.* at 275.

oppression. Because they enable contrasting insights into the collisions between preservation of distinctive cultures and norms against gender discrimination, I examine them here in detail.

First, Young identifies exploitation as the "domination [that] occurs through a steady process of the transfer of the results of the labour of some people to benefit others."⁷¹ One of the intriguing qualities of this dimension is its ambiguity about the scope of labour: does it include, as feminist theorists have advocated, reproductive activities? If not, the concept may systematically devalue women's contributions to a family; if so, the concept may be useful in evaluating a problem such as the patrilineal rules of an Indian tribe or the restrictions on reproductive choice imposed by a particular subgroup contrary to the dominant society's position.

Second, Young discusses marginalization which denotes the ways that an individual or group may be expelled from useful participation in social life, citizenship, and productivity.⁷² If the subgroup systematically excludes women from participation in its social life, its governance, and its productive activities, should we conclude that it oppresses women? This, too, is a complicated question. The very definition of social life – and of people's roles in it – may vary by subgroup, and gender-based roles are so familiar in social activities that notions of equality have proved slippery and divisive. On the issues of political governance and productive activities, gender based exclusions could well be examined; if demonstrated, a case for gender-based oppression could be supported.⁷³ For example, the Jewish requirement that a husband grant a wife a religious bill of divorcement before she may be considered properly divorced under religious law could be interpreted as a gender-based exclusion, especially if it means that women are systematically excluded from remarriage within the religion simply

⁷¹ *Ibid.* at 278.

⁷² *Ibid.* at 281.

⁷³ Internal challenges, brought through internal subgroup procedures, to the exclusion of women from positions as religious officials, already suggest how some subgroup governance and participation practices have been drawn along gender lines, to the disapproval of growing numbers of women who consider themselves loyal group members. Thus, efforts to ordain women as ministers, priests, and rabbis have produced conflicts, and sometimes change within particular religious groups.

due to the refusals of their husbands to follow this religious law while securing a secular divorce.

Young's third dimension of oppression is powerlessness; she defines it with a special focus on the contrast between professionals and nonprofessionals in societies that accord to professionals much greater autonomy and opportunity for creativity in their work.⁷⁴ A more general meaning of powerlessness could also be pursued in exploring the possibilities of oppression against women by subgroups. A sophisticated study of the practice of *Sati* – self-sacrifice by a widow at the funeral of her husband – suggests that this practice offers a venerated position for the woman who chooses it; she is deemed to escape the lowly spiritual status usually assigned to women and to offer spiritual benefits to her family and community by choosing this act.⁷⁵ Indeed, the practice can be considered oppressive only in light of the larger question, what kind of society would create so few options for veneration for women that suicide upon the death of the husband would be a desired opportunity?

Next, Young introduces the notion of cultural imperialism as "the experience of existing with a society whose dominant meanings render the particular perspectives and point of view of one's own group invisible at the same time as they stereotype one's group and mark it out as the Other."⁷⁶ Young expressly cites women as likely to be subjected to this experience, and contemporary debates about women's status in cultural forms, academic disciplines, and political discourse may support the charge of imperialism against women by the dominant society. Yet, assessment of the treatment of women's experiences in subgroups may reveal that women are not oppressed by the Amish, or other culturally distinctive groups, and it will be difficult to determine whether any outsider can fully understand women's experiences in such subgroups. The concept of oppression on this basis may still be relevant, however, if women who are members of a subgroup

⁷⁴ See Young, *supra*, note 12 at 283.

⁷⁵ V.N. Datta, *Sati: A Historical, Social and Philosophical Enquiry Into the Hindu Rite of Widow Burning* (New Delhi: Manohar Publications, 1988).

⁷⁶ Young, *supra*, note 12 at 285.

themselves claim that their experiences are rendered invisible or stereotyped by their own group.

Young's final dimension of oppression is systemic violence, directed on the basis of group membership.⁷⁷ Feminist analyses of rape and pornography in dominant Western culture maintain that these are instances of oppression manifested as systemic violence against women. Some also argue that efforts to regulate and restrict abortion represent systemic violence against women by exposing women to risks of illegal and dangerous abortions or by constraining women's control over their bodies. These are challenging arguments that redefine violence. Perhaps, instead, a different quality of oppression should be articulated to convey the point.

Indeed, Young's conception of oppression is only one initial point of departure in what I hope will be a sustained scholarly effort to give meaning to the concept. Studies of the sources of oppression from economic and social structures would be important for this effort. Work by scholars on these subjects seldom enters the discourse of lawyers and judges. Devising ways to talk about oppression will be critical to any effort by law to take tolerance seriously. Part of this effort must include a search for means to resist becoming a party to oppression in the very critique of oppression. As Susan Griffin has written, theories of liberation begin as efforts to articulate feeling of oppression, and they restore

to the oppressed a belief in the self and in the authority of the self to determine what is real.... But when a theory is transformed into an ideology, it begins to destroy the self and self-knowledge.... It organizes experience according to itself, without touching experience.... It is annoyed by any detail which does not fit into its world view. Begun as a cry against the denial of truth, now it denies any truth which does not fit into its scheme. Begun as a way to restore one's sense of reality, now it attempts to discipline real people, to remake natural beings after its own image. All that it fails to explain it records as dangerous. All that makes it question, it regards as its enemy. Begun as a theory of liberation, it is threatened by new theories of liberation; slowly, it builds a prison for the mind.⁷⁸

The very method of inquiry into oppression must not become intolerant of challenges. The tension between admirable tolerance

⁷⁷ *Ibid.* at 287.

⁷⁸ S. Griffin, "The Way of All Ideology" (1982) 7 *Signs: Journal of Women in Culture in Society* 641 at 648.

and despicable oppression has long persisted. Thus, it should not be surprising that a recommendation for the optimal public policy to resolve the tension cannot be made. The struggle to give content to the criteria of oppression will require participation by the very people who experience it in countless ways.

IV. CONCLUDING: A BEGINNING

Lo and behold, here in our midst is dissimilarity that simply could not be squelched, and that now is insisting on its right to flourish.

Jane Jacobs⁷⁹

We have to learn to tolerate questions.

Susan Griffin⁸⁰

This article began by advocating commitments to preserve distinctive cultures. This means reconceiving tolerance to include the vantage point of members of traditional subgroups that do not share the dominant liberal commitments to individual choice, experimentation, and value relativism. Arguments were made in favour of gender equality, although, in many instances, this runs counter to the practices of traditional cultures and religious groups. Together, these arguments pose a question: What mix of concerns for group rights or cultural preservation, on the one hand, and individual rights and freedoms, on the other, should a given society pursue if it hopes to respect cultural diversity without colluding in the domination or oppression of some of its own members?

Yet, even this question makes the problem look too simple. There remain urgent needs for larger structures of political organization, economic co-ordination, and communication and ideology for ordering relationships among subgroups, and providing methods for articulating and resolving conflicts. Global markets drive political centralization and co-ordination efforts. Nations within large sectors of the world have come together for mutual support in part to counter competition across such sectors, and in

⁷⁹ J. Jacobs, *The Question of Separatism: Quebec and the Struggle Over Sovereignty* (Toronto: Random House, 1980) at 115.

⁸⁰ See Griffin, *supra*, note 78 at 659.

part to provide larger contexts within which to order relationships among subgroups as well as to define and handle the kinds of conflicts that could spell war. The allocation of governmental powers between levels and among branches of governments – and between nations and continents – poses a difficult enough question when economic and military concerns are most salient. When combined with the paradoxes and dilemmas of tolerance, these central questions of political design are enormously complicated, and comparisons of historical experiences suggest that no determinate mix of powers is significantly better than another in preserving distinctive cultures or enforcing individual rights.

The problems of tolerance and intolerance increase with the lack of coincidence between territorial boundaries and cultural boundaries. Geographical boundaries fail to match up with cultural boundaries as nation states form and reform with boundaries that encompass members of many different cultural groups, and as members of different cultural groups move to nation states where they have not previously lived. One observer commented that "[t]here are thousands of ethnic, tribal, racial, lingual and ethno-religious communities" while "there are only about 150 'nation' states, within which heterogeneous groups coexist."⁸¹

Given this diversity of cultural groupings within nation states, there are historic and persistent demands for self-governance by local and regional authorities that claim greater identification with and responsiveness to their particular cultural groups than to the central authorities. Yet, some groups remain minorities even at the local and regional levels. They may find more protection for their interests – more promise of tolerance – if a centralized national government retains control. Still other groups may believe that international accords better assure tolerance, perhaps because they represent cultures that are minorities in their own country of residence, but majorities elsewhere, or perhaps because the norms developed in international accords better recognize their rights or

⁸¹ I. Duchacek, "Federalist Responses to Ethnic Demands: An Overview" in D.J. Elazar, ed., *Federalism and Political Integration*, (Lanham, MD: University Press of America, 1984) at 59.

needs.⁸² Some groups may discover that no particular form of official policy within a nation provides protection for cultural autonomy, self-governance, or basic human rights; they may find more promising assistance in the sphere of international human rights. The Native American experience in the United States may provide such an example. Perhaps no greater variety of theories about federalism has appeared in American jurisprudence than on this topic; from co-ordinate sovereigns, to dependent nations, to wards protected by the nation-state, or to individuals with some special claims, Native Americans have witnessed administrators and judges persistently denying the power and entitlements of these culturally distinctive groups.

The variety of governmental relationships, connecting local, regional, national, and international authorities, carry both promise and threats to cultural diversity. In the abstract, it is not obvious that any particular allocation of responsibility among levels of government will assure more tolerance for cultural diversity than any other. Contextual, historical inquiries can provide some illumination of the consequences of varied patterns of relationships among local, regional, national, and international authorities for the preservation of cultural diversity.⁸³ In part, such inquiries replay the contrast between the liberal conception of individual rights and alternative notions of group identity. For example, a linguistic minority may find support from the central government for its bilingual schools, or, in another political context, local control may prove more hospitable for the minority. Different cultural groups, at different times, have found more help through one of these

⁸² Carol Weisbrod is writing a book that should remind us of the nongovernmental sources of authority. These sources remain vital and in a superior competitive position for many cultural and religious groups that view secular governmental authority as simply one, inferior source of rules. See C. Weisbrod, *Toward a History of Essential Federalism: Another Look at Owen in America* (1989) [unpublished].

⁸³ See, e.g., J.M. Balkin, "Federalism and Conservative Ideology" (1987) 19 *Urban Law.* 459 (exploring the historic, rather than inherent, link between the notion of state's rights and conservative ideologies in the United States); R.H. Fallon, "The Ideologies of Federal Courts Law" (1988) 74 *Va. L. Rev.* 1141 at 1146-47 (noting political alignments and deep ideological structures of thought associated with preferences for state sovereignty compared with preferences for national authority in the United State's jurisprudence of federal court power). See also Minow, *supra*, note 40 (comparing the United States and Canada in terms of federalism and minority group experiences).

conceptions over the other, and different levels of governmental authorities have similarly found varied reasons for adopting one rather than the other.

In short, the tensions and paradoxes explored in this article do not suggest solutions. Indeed, one of its purposes is to argue that solutions are likely to neglect the multiple perspectives on issues of tolerance, cultural diversity, and allocation of governmental power. The search for an answer is so often stymied by the faulty assumption that the right question has been asked. What questions are right profoundly reflects the point of view of the inquirer, and this fact can bedevil efforts to get beyond the acknowledged limits of one point of view. "How can a society promote tolerance?" is an inadequate question not only because tolerance leads to passive acquiescence to existing power arrangements rather than accommodating or respecting differences, but also because tolerance risks undermining subgroups committed to particular values inconsistent with majority practices. Yet, there are comparable faults in a question such as "how can a society respect and preserve cultural diversity?" because that formulation obscures the potential tension between preserving some subcultures and promoting individual rights that may be undermined by those very groups.

An underlying problem in both questions is the pretence that the question can be asked without a point of view. It is also no solution for a complex society to simply embrace an existing point of view in order to address questions about tolerance and cultural diversity. The challenge is to formulate an inquiry from a point of view that can acknowledge other points of view and their differences. Once pursued, such an inquiry cannot be neutral. It is for that reason that I advocate explicit attention to the concept of oppression, even though that concept will inevitably invite debate over its meaning and its application. Respecting cultural diversity while also pursuing basic liberal freedoms and individual rights must be an ongoing struggle among people who disagree about many things. In the spirit of such a struggle, scholarly and political efforts to define the notion of oppression must be pursued by people holding different points of view. The search is for a language to talk about pain and powerlessness while acknowledging the incommensurability of experiences and, indeed, the impossibility of producing a language with universally shared meanings.

What combination of large structures and primary group identities can provide latitude for individual freedoms, respect for historically different subcommunities, and co-ordination of economic and political institutions and activities across locales, regions, states, and nations? Varied versions of federalism – relationships that simultaneously recognize the demands for centralization and the needs to decentralize – provide promising models for responding to this large question.⁸⁴ At the same time, I suggest, there is nothing peculiar to a federal system that exacerbates or eases problems of preserving cultural diversity.⁸⁵ Within particular time periods, within particular constellations of relationships among levels of government and between cultural groups, arguments for and against greater centralization or greater decentralization provide avenues for both protecting and undermining cultural diversity. Historically, centralized governmental authority has been linked to the development and articulation of individual rights which may become corrosive to particular cultural traditions while advancing the freedom and self-realization of each person. There may be ways, however, that centralized governments can protect subgroups from intolerant policies of local authorities. Yet, whatever level of government retains control of any given issue, there will persist a tension between the basic rights of individuals to be free from discrimination on the basis of immutable traits and respect for subgroups thus enabling the preservation of cultural traditions.

What may be most important is simply the existence of multiple levels of governmental authority. It is the presence of multiple authorities that, paradoxically, gives minority groups the opportunity to seek alternatives to a singular answer. Robert Cover's work on the values of jurisdictional redundancy provides an eloquent defense of the multiple court systems in the United States. These systems increase the chances that errors will be corrected, and

⁸⁴ See Minow, *ibid.*

⁸⁵ A compatible view is developed in R.B. Cappalli, "Restoring Federalism Values in the Federal Grant System" (1987) 19 Urb. Law. 493 at 510: "[W]hile federalism cannot be a power switch, perhaps it can be a fine-tuner within the politically determined structures and nation-state allocations of authority existing at any given moment."

ultimately allow less powerful voices the chance to be heard.⁸⁶ Thus, governmental powers should be allocated to multiple sources of authority in an effort to enhance the avenues for challenging public and private intolerance.

The challenge, from this vantage point, is to devise modes of inquiry that can solicit multiple perspectives rather than suppress them. At the same time, a further challenge is to construct structures of governance that can acknowledge *legal pluralism* – the variety of sources of authority that include religious and cultural practices outside of the governmental hierarchy of local-national-international authority – and still retain some ability to govern with coherence.⁸⁷ What mix of respect for multiple authorities and demands for singular authorities can provide for the conflicting demands of order and freedom yet also elicit respect and solicit assent from people with differing backgrounds and assumptions?⁸⁸ Further, what other questions should be framed to reflect the views of those historically unrepresented in dominant legal discourse?

I close with three images that may assist future discussion of these issues. The first comes from Marge Piercy's novel, *Woman on the Edge of Time*.⁸⁹ The book combines two stories. The first tells of a poor woman of colour who, through a series of misfortunes, finds herself in a mental hospital where she is repeatedly subjected to shock treatments. The second story concerns either the delusions of this woman, or the utopia she periodically escapes to, only to return to the mental hospital. In the utopia, the main character views many intriguing contrasts with contemporary American society. For example, children are born only through test tubes; parents sign up for the opportunity, and thus, parents and children are commonly

⁸⁶ R.M. Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation" (1981) 22 Wm. & Mary L. Rev. 639.

⁸⁷ Some would argue in favour of some recognition of legal pluralism, and subgroup autonomy, in part because cultural subgroups within a country may provide a vehicle for better democracy given the limits of direct democracy. See Wolff, *supra*, note 1.

⁸⁸ See generally G.W. Carey, ed., *Order, Freedom, and the Polity: Critical Essays on the Open Society* (Lanham, Md.: University Press of America, 1986).

⁸⁹ M. Piercy, *Woman on the Edge of Time* (New York: Alfred A. Knopf, 1976),

of different races and backgrounds. Upon reaching adolescence, every individual changes parents and goes to stay with a new guardian who shepherds the person through that transition to adulthood. In addition, equality on the basis of gender is unhampered by gender differences in child-bearing and child-rearing.

More to the point of the topic of tolerance, this society confronted the issue of how to preserve distinctive cultures while avoiding the historical stigmas and status differentials associated with groups that were less powerful. The society decided to preserve traditional groups, and promote the development of new groups, but made group membership entirely voluntary. An adult could choose to join any group, such as a group devoted to preserving the traditions of the Iroquoian Indians, or a group interested in exploring and revising Reformation Protestantism. A child would participate in the group chosen by his parent, or the multiple groups chosen by his multiple parents. Upon reaching adolescence, he or she could try any group available. In this way, the society maximized exit options by maximizing entry options. Thus, the society avoided converting all cultural traditions into mere museum artifacts or shopping-mall displays of fashions and foods.

The second image comes from an intriguing book by R.L. Moore called *Religious Outsiders and the Making of Americans*.⁹⁰ The book explores how each religious group in America helped to forge American history, and how each group, through time, has cultivated the idea of itself as an outsider to American culture. Thus, leaders of the Mormon Church explicitly elaborated narratives of oppression in part to strengthen this sense of group identity. American Jews, as well, created these narratives, building on long traditions of external oppression and internal stories of chosen uniqueness. American Catholics decided to preserve the ethnic and national differences of immigrant Catholic groups, and were thereby assured multiple meanings of outsider status in American culture. As Moore explores this theme in the history of Christian Scientists, Black Protestants, Fundamentalists, and early Protestant settlers, he suggests how "[r]eligious struggles engage people in elaborate strategies that on each side entail affirmation and denial,

⁹⁰ *Supra*, note 44.

advancement and repression, of a set of cultural options."⁹¹ Similarly, most Americans gained a sense of being American "by turning aspects of a carefully nurtured sense of separate identity against a vaguely defined concept of mainstream or dominant culture."⁹² Although he does not claim that this creation of stories about marginality explains the relative peace found in the United States despite enormous religious heterogeneity, Moore's account suggests that some forms of tolerance may be promoted if everyone feels somewhat marginal.⁹³

The final image, parochial as it may be, is of a law school. Imagine a law school that has celebrated its commitments to tolerance, demonstrated by its inclusion of people of varied backgrounds and political viewpoints as students and faculty. It has representatives of racial, religious, and ethnic minorities, and as large a percentage of women as any other law school. Imagine that some of its more *unusual* faculty members begin to write articles and teach courses that are deliberately not in the mainstream. Some talk of feminism, others talk of multi-culturalism; some talk of economics, others of semantics and semiotics. Some of the more traditional members describe their feelings of rejection as the newer faculty members deprecate traditional work. Some of the traditionalists talk increasingly about the danger of declining standards and the need to re-establish standards by denying someone tenure. Indeed, in a spectacular and prolonged battle, a woman is denied tenure. In such a context, what does tolerance mean? How can it be that a traditionalist may say, "We tolerated them, after all we appointed them, but they don't tolerate us," when a newcomer says, simultaneously, "Where's their tolerance, really? I happen to think traditional doctrinal work is bunk"? Who is putting up and who is putting down? There are more important struggles out there than what goes on in law schools. Yet, if we can't make sense of

⁹¹ *Ibid.* at xiii.

⁹² *Ibid.* at xi.

⁹³ My experience representing diverse religious organizations in an abortion rights case before the Supreme Court (see *Reproductive Services*, *supra*, note 64) similarly suggests that the common threat - state regulation - can bring otherwise disparate and mistrustful groups together.

tolerance, and pay attention to who is oppressed by what we do in its name or despite it, how can we expect anyone else to?